87-1523

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT C. MORRIS,
Petitioner

COOPER STEVEDORING CO., INC., and
INSURANCE COMPANY OF NORTH AMERICA,
Intervenors

VERSUS

COMPAGNIE MARITIME DES CHARGEURS REUNIS, S.A.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

UNDER THE ESTABLISHED STANDARD OF REVIEW FOR BENCH TRIALS MAY THE REVIEWING COURT SET ASIDE THE TRIAL COURT'S FACT FINDINGS AND SUBSTITUTE ITS OWN FACT FINDINGS, WHOLLY UNSUPPORTED BY THE RECORD?

SHOULD AN INJURED LONGSHOREMAN BE REQUIRED TO OFFER EVIDENCE AS TO WHETHER DUE CARE REQUIRED INSPECTIONS OF GEAR AND EQUIPMENT BEFORE TURNING VESSEL OVER TO STEVEDORE, AND IF SO, THE KIND OF INSPECTIONS, WHEN THE DUTY TO INSPECT IS IMPOSED ON THE VESSEL AS A MATTER OF LAW?

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II. Without finding any of the Trial Court's findings "clearly erroneous", the Appellate Court departed totally from the mandated standard of review and substituted its own findings, completely unsupported by evidence, for the Trial Court's Findings.

III. The Appellate Court's finding that the Trial Court erred in finding the vessel negligent for failing to discover a hidden defect in the absence of evidence as to whether due care required inspections and, if so, of what kind, introduces a new legal theory in conflict with *Scindia, Hedrick, Biggs, Davis,* cases imposing the positive duty to inspect before turning over to stevedores.

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COMPAGNIE MARITIME DES CHARGEURS REUNIS, S.A.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT C. MORRIS, petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 832 F. 2d 67, and appears in the Appendix. (App. A, infra P. A-1 thru A-10). The Judgment of the 5th Circuit Court of Appeals and the Denial of the Petition for Rehearing is reproduced in the Appendix. (App. B, infra P. B-1, 2). The opinion of the District Court is not reported. The Findings of Fact and Conclusions of Law by the Trial Court appear in the Appendix. (App. C, infra P. C-1 thru C-11). The Judgment of the District Court is included in the Appendix. (App. D, infra P. D-1, 2).

JURISDICTION

The Judgment of the 5th Circuit Court of Appeals was entered on November 16, 1987. A Petition for Rehearing was denied December 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C Section 1254 (1).

STATEMENT OF THE CASE

Plaintiff was working as a plugman on board the Seatrain Ticonderoga. On June 24, 1980, while descending from the top of a container via a ten-foot aluminum ladder, the ladder slipped causing him to fall, entangled with the aluminum ladder. He substantially amputated his foot at the ankle, except for two (2) centimeters of skin and flesh.

Suit was filed in U.S. District Court for the Southern District of Texas pursuant to 33 U.S.C. Sec. 905(b), (LHWCA).

Plaintiff and his partner, Davis, were working as plugmen on the first tier of containers. The spreader bar was loaded with the first container for the second tier, and the crane operator noticed that the plugs were missing from the top of the container to be first covered by the second tier of containers. The *paceco crane was stopped and being delayed* until plugs were placed appropriately. Plaintiff and his partner *were being rushed* to place those plugs so that the paceco crane could continue working. The evidence shows that there were ship's ladders available on deck and that the Plaintiff either:

(i) Picked one up himself; or

(ii) Was handed a ladder by his walking foreman; or

(iii) Was given a ladder by a ship's crewman.

There is no dispute that it was a ship's ladder that was used by the Plaintiff. The paceco crane was loaded and was required to stop and hold up the loading process while

'plugs' were placed in the corners of the first tier of containers.

Plaintiff and his working partner, Davis were rushed and climbed the ladder to the top of the container, and while his partner was placing the last plug, the Plaintiff started down the ladder. Plaintiff's testimony was that after placing one of the corner plugs, Davis said, "We have one more plug.", and the Plaintiff said "Okay. I am going on down, hold the ladder.", and Davis said, "All right, I got it." As Plaintiff stepped on the ladder, the aluminum ladder slipped from under him, causing him to fall, entangled with the aluminum ladder. The Walking Foreman, Wilfred Keal, Jr., immediately went to the scene and observed the aluminum ladder to be *in good condition, straight, not twisted, with no rungs missing, but it had no rubber tips.* He stated that in just looking at it, there was nothing "*obviously*" wrong with it. That "*it looked perfectly safe and usable as far as the structure and rails that was in it.* Laying down (the ladder), you could see no pads on it."

In the Findings of Fact and Conclusions of Law the Trial Court found that the ladder was not bent or missing rungs. The Trial Court found that the ship's metal ladder used in this instance either had no rubber feet or the rubber feet were worn slick on the bottom. The Trial Court also found that in order to discover that the pads were worn slick, the longshoreman would have had to turn the ladder over and inspect the bottoms of the ladder's rubber feet.

The Trial Court further found that the Plaintiff and his co-worker, Davis, used the ladder because of the exigencies of their circumstances; because the plugmen (Plaintiff and Davis) had to set the plugs in the last first tier container before loading operations could proceed.

The Trial Court found that ship's ladders were "all around the ship" the day of the accident. A typographical error in

Finding of Fact numbered 19 says "Stevedore's ladders were locked away on *deck*," whereas the actual testimony and record state "locked away on the *dock*."

The Trial Court also found that it was not unusual for Plaintiff to have used the ship's ladder because the local custom in the industry is for stevedores to use ship's ladders on one-high containers.

Based on these facts, the Trial Court concluded the vessel owner should have known that the longshoremen might well use the ladder involved in the accident. The Trial Court concluded that the shipowner in the exercise of reasonable care should have: (i) put the ladder in such a condition that the stevedore could have used it safely; or (ii) prevented the stevedore from using the ladder; or (iii) warned the stevedore of the defect in the ladder.

The Trial Court found for the Plaintiff in the amount of $715,836.00 (setting aside $128,122.56 to the Intervenor).

Upon appeal by the vessel owner the Honorable Fifth Circuit Court of Appeals reversed the Judgment of the trial court.

REASONS FOR GRANTING THE WRIT

I.

THE APPELLATE COURT'S ACTION ADVERSELY AFFECTS THE CONFIDENCE OF THE TRIAL BAR AND THE GENERAL PUBLIC IN THE FEDERAL TRIAL COURTS.

II.

WITHOUT FINDING ANY OF THE TRIAL COURT'S FINDINGS 'CLEARLY ERRONEOUS', THE APPELLATE COURT DEPARTED TOTALLY FROM THE

MANDATED STANDARD OF REVIEW AND SUBSTITUTED ITS OWN FINDINGS, COMPLETELY UNSUPPORTED BY EVIDENCE, FOR THE TRIAL COURT'S FINDINGS.

III.

THE APPELLATE COURT'S FINDING THAT THE TRIAL COURT ERRED IN FINDING VESSEL NEGLIGENT FOR FAILING TO DISCOVER A HIDDEN DEFECT IN THE ABSENCE OF EVIDENCE AS TO WHETHER DUE CARE REQUIRED INSPECTIONS AND, IF SO, OF WHAT KIND, INTRODUCES A NEW LEGAL THEORY IN CONFLICT WITH *SCINDIA* (APPEN. C, P. C-5) *HEDRICK BIGGS, DAVIS,* CASES IMPOSING THE POSITIVE DUTY TO INSPECT BEFORE TURNING OVER TO STEVEDORES.

The Fifth Circuit Court has in this case, without finding any of the trial court's findings of fact or conclusions on law to be 'clearly erroneous' substituted its own findings of fact. In doing so the Appellate Court writer has attributed words and statements to the record, and based findings upon them, when those words and statements just simply are not in the record and the findings are *just not supported by even a scintilla of evidence.*

The trial bar relies heavily upon the established policy that an appellate court will not depart from the accepted and usual course of judicial proceedings, and will uniformly apply the established standard of review of trial court judgments in bench trials. The United States Supreme Court has stated that on review, a District Court's fact findings will be set aside only where '*clearly erroneous*' (emp. added) from a review of the evidence presented before the trial court. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394, 395 (1948). In maritime cases such as this, "questions

of negligence and proximate cause are treated as factual issues which cannot be disturbed on appeal unless the trial court's resolutions are clearly erroneous." *Valley Towing Service, Inc.* v. *S.S. American Wheat*, 618 F.2d 341 (5th Cir. 1980); *Marcona Corp.* v. *Oil Screw Shifty, III*, 615 F.2d 206, 208 (5th Cir. 1980).

It is critical that the public and the trial bar be secure in knowing a definite standard of review that shall be exercised by an appellate court, in order that proper tactical decisions may be made at the trial level. Extremely valuable individual rights based upon damages, and extremely valuable rights of responding parties require that the standard of review of appellate courts be clear.

Petitioner respectfully submits that this standard has not been followed in this case, and it is therefore critical that the Supreme Court speak to this issue.

The Trial Court in its Conclusions of Law Number 8, stated, "The danger posed by the ladder *might have been open and obvious if* the ladder simply had no rubber feet." (emp. added). The Trial Court then included a very able and accurate interpretation of the facts in this case, applying relevant case law.

The Honorable Fifth Circuit writer substituted his own finding of fact for those of the trial court by magically converting the phrase "*might have been open and obvious if*" into a trial court finding of open and obvious defect. They then allude to the Trial Judge "recognizing that the stevedore should have noticed an obvious defect." (Opin. P. 519). Such statement interjects findings that just do not exist and are not contained anywhere in the trial court's findings of fact or conclusions of law.

There was no testimony that the defect in the ladder was obvious. No one other than the defendant's attorney stated that the defect in the ladder was open and obvious.

Under the Trial Court's findings and conclusions of law number 8, the Trial Court very correctly reviewed the case law that would apply in light of the facts in this case, *if* there was an obvious defect in the ladder. The Trial Court's application of the *Harris, Napoli,* and *Stass* line of cases to the facts found in this case accurately demonstrates that a finding of open and obvious danger does not automatically bar the longshoreman's suit for negligence against the vessel under 33 U.S.C. Section 905(b). If the Trial Court had made a finding that the defect in the ladder was open and obvious, the case would fit squarely within the scope of that series of Second and Fifth Circuit decisions, stating: "Because longshoremen, when faced with openly dangerous shipboard conditions have only alternatives of leaving the job or facing trouble for delaying the work, the fact that danger was obvious is not necessarily a complete defense to longshoremans suit and his own knowledge of shipboard hazard does not negate shipowners duty of care which would otherwise exist." *Harris* v. *Flota Mercante Gran Columbia, S. A.*, 730 F. 2d 296 (5th Cir. 1984); *Napoli* v. *Hellenic Lines, Ltd.*, 536 F. 2d 505 (2d Cir. 1976); *Stass* v. *American Commercial Lines*, 683 F. 2d 125 (5th Cir. 1981)

The appellate opinion recognizes that the record supports the Trial Court's finding that Petitioner was under pressure to set the plugs involved so that the loading process would not be delayed. The record is clear that such exigent circumstances did exist. Testimony included "because the spreader bar was loaded, and there was no way for the men to use the personnel basket"; "the spreader bar had been sitting there for a couple of minutes waiting for them"; and "they are not

going to wait on you, that spreader bar, for the first box. You have got to get that ladder and get up there."

The appellate court made a finding that the trial court's finding that exigent circumstances required use of an obviously defective ladder lacking safety feet was error. (Opin. P. 519)

Firstly, the appellate court converted a discussion based on possibilities by the trial court into a finding of fact attributed to the trial court. This is a substitution of the writer's finding of fact for the trial court's finding, and is not supported by any evidence and the reviewing court did not find that the Trial Court finding was clearly erroneous.

Secondly, the trial court's application of the case holdings on the effect of open and obvious defects upon the liability of vessels, and the effect of exigent circumstances upon liability, are accurate interpretations of the law. If the trial court had made such a finding of fact, under the circumstances of this case, it is clear that it would be well supported by evidence and the reviewing court should not disturb the finding unless it was clearly erroneous.

The trial court's findings of fact do not find that the ladder was obviously defective and this is a finding substituted by the appellate court writer. To support this substituted finding the writer has interjected new facts or conclusions that are not supported by any evidence or testimony in the trial record. This is a clear departure from the mandated standard of review.

There was *no evidence* that other ladders were *readily accessible* (Opin. P. 519); there was *no evidence* that Stevedores ladders were locked away on *deck.* (typo. error in Tr. Ct. Findings for 'dock'); there was *no evidence* that the subject ladder was *clearly defective* (Opin. P. 519); there was *no evidence* ~~to suggest~~ that an affirmative seeking out of a

safer ladder by the Petitioner would have caused *only momentary delay* (Opin. P. 519); There was *no testimony* of "an obviously defective ladder" (Opin. P. 519), and all of the evidence in the record was to the effect that the ladder was *not* obviously defective.

Not one single witness described the ladder as being obviously unsafe. The nearest thing to such testimony was the Petitioner himself saying it looked "whompy jawed" and had dents, whereas everyone else testified that the ladder appeared in good condition.

The trial court's discussion of the applicable law relating to "might have been open and obvious if", was correctly directed at analyzing the applicable law because of her finding of fact numbered sixteen, which included, "the metal ladder either had no rubber feet or the rubber feet were worn slick on the bottom," in light of the *Scindia Steam Navigation Co.* v. *De Los Samtas,* 451 U.S. 156 (1981); *Pluyer* v. *Mitsui O.S.K. Lines, Ltd.*, 664 F.2d 1243 (5th Cir. 1982; *Lemon* v. *Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981); and *Theriot* v. *Bay Drilling Corp.*, 783 F.2d 527 (5th Cir. 1986) line of cases which are precisely on point. (Trial Ct. Concl. of Law, 3-8, Appendix C, Pp. C-5 thru C-9.)

The writer further stated that in this case, "Petitioner and the stevedore could have avoided the danger with almost no interruption of their work by using any of the safe ladders all around the ship." (Opin. P. 520). There was *no testimony* to support a statement or finding that there were *safe ladders* "all around the ship." (emp. added).

Again, this would be substituting the writers findings of fact, for the trial court's findings of fact which are all well supported by the evidence, while never finding that the trial court was clearly erroneous in its findings.

IV.

AN INJURED LONGSHOREMAN SHOULD NOT BE REQUIRED TO OFFER EVIDENCE AS TO WHETHER DUE CARE REQUIRES INSPECTIONS OF GEAR AND EQUIPMENT BY THE VESSEL OWNER BEFORE TURNING THE VESSEL OVER TO THE STEVEDORE, WHEN THAT DUTY TO INSPECT IS IMPOSED UPON THE VESSEL OWNER BY LAW.

The 1972 amendments to the Longshoreman's and Harborworker's Compensation Act (LHWCA), 33 U.S.C. Section 901, *et. seq.*, substituted a statutory negligence action against a vessel in lieu of unseaworthiness as a theory of recovery for longshoremen. Around the United States at any given time there exists a large number of negligence actions under section 905(b) of Title 33. The Supreme Court has outlined extensively the duties that vessels and vessel owners owe to longshoremen working on board the ships, in *Scindia Steam Navigation Co.* v. *De Los Santos*, 451 U.S. 156 (1981).

It is urgent and critical to both the plaintiffs and the defendants involved in pending section 905(b) negligence cases to receive the direction of this Honorable United States Supreme Court as to whether the positive duties of inspection placed upon vessels and vessel owners pursuant to the *Scindia* opinion is changed by the interpretation of the law by the 5th Circuit in this case, requiring the injured longshoreman to offer evidence as to whether due care required inspections of gear and equipment before turning a vessel over to the stevedoring company, and if so, what kind of inspections.

The appellate court's opinion would indicate that the writer found that the trial court erred in finding the shipowner negligent for failing to discover a hidden defect in the absence of any evidence as to whether due care required

inspections, and, if so, of what kind. The Appellate Court did not find the Trial Court's finding of negligence "clearly erroneous."

The statement in the Appellate Court's opinion that Plaintiff failed to establish that ordinary care would have led the shipowner to discover the defect, and that no evidence was produced establishing what practices constitute ordinary care among shipowners, is clearly placing an implied duty upon an injured party that would be contrary to this Court's statements establishing positive duties upon vessels and vessel owners *prior* to turning a vessel over to stevedores. If vessel owners turn over vessels to stevedores with defective equipment or with dangerous working conditions existing, then the vessel owner has clearly violated its positive duties. This would be true whether they do or do not have procedures that require regularly inspecting the ladders, or whether they do or do not engage in maintenance programs. Such evidence would clearly not be controlling of the issues.

The Fifth Circuit opinion that the Petitioner failed to produce testimony or documentary evidence that "shipowner's regularly inspect the ladders on their vessels or engage in maintenance programs," is *significantly inconsistent with the law established by this Court in the Scindia case* and followed by the Fifth, Eighth and Ninth Circuits. The *Scindia* duty of care, as to gear and equipment requires the shipowner to exercise ordinary care with respect to that ship's equipment which the shipowner should know the stevedore will use. *Scindia* mandates the shipowner's duty to ensure that the ship's equipment is in such condition as to permit its safe use by the stevedore. The Trial Court in Conclusion of Law number four (4) correctly stated the applicable standard as follows:

> The shipowner in the exercise of reasonable care should have had the ladder in such a condition that the stevedore could have used it 'by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property.' *Scindia*, 451 U.S. at 167.

The *Scindia* duty of care includes a duty, applicable prior to commencement of stevedoring operations, to inspect ship's equipment that will be used by the stevedore. The Ninth Circuit expressly recognized that duty of inspection as follows:

> Where the shipowner itself supplies equipment, it has a duty to inspect the equipment before turning it over for use by the stevedore. *Scindia, supra.*

Hendrick v. *Daiko Shoji Co., Ltd., Osaka,* 715 F.2d. 1355, 1357 (Ninth Cir. 1983), 733 F.2d 1335 (9th Cir. 1984, reh.).

The Eighth Circuit in *Biggs* v. *Logicon, Inc.* 663 F.2d. 52, 54 n.2 (8th Cir. 1981), has recognized such a duty of inspection incorporated by *Scindia.*

> When read in isolation, the quoted material [from *Scindia*] could lead one to believe that a shipowner never has a duty of inspection. Other parts of the Court's opinion [in *Scindia*] clearly show that the Court is referring to a duty to inspect during cargo operations. Earlier in the opinion, the Court stated that the shipowner has a duty of reasonable care which can include *inspection* a breach of which will leave him liable for negligence. 451 U.S. at 167 (emphasis added).

Thus, while the shipowner may have no inspection duty *during* cargo operations, *the duty to inspect* is clearly imposed prior to turning the ship's equipment over to the stevedore. Cf. *Davis* v. *Hill Engineering, Inc.*, 549 F.2d. 314, 329 (5th Cir. 1977) (Jones Act negligence duty includes duty to inspect vessel for hazards).

The duty to inspect ship's equipment for hidden defects is imposed as a matter of law.

Thus, the Honorable Circuit Court erroneously states that Petitioner was required to prove that shipowner's regularly inspect the ladders on their vessels or engage in maintenance programs. (Opin. P.518). Such conclusion is *significantly inconsistent* with the holdings of *Scindia, Hedrick, Biggs* and *Davis*. The question of the duty to inspect is a question of law that has been settled.

Proving that a shipowner regularly inspects its vessels gear, (i.e. ladders) or engages in maintenance programs are matters of proof for defensive issues and it would be inconsistent and illogical to require plaintiff to prove such facts. This finding is wholly inconsistent with the above line of cases, *and introduces a new legal theory in conflict with the positive duty of inspection upon the vessel owners pronounced by our courts.*

The appellate opinion further finds that Cooper Stevedoring's actions fell well below the standard of an expert and experienced stevedore. (Opin. P. 521) This certainly convicts the stevedore of negligence in failing to notice the defect in the ladder, however the appellate court's finding of negligence on the stevedore does not relieve the shipowner of its *Scindia* Category One negligence. (see trial court conclusions of law number 3, Appendix C, P. C-5)

Petitioner respectfully submits that *Scindia* entitles the shipowner to rely on an "expert and experienced stevedore" acting with "reasonable care" after the stevedoring operations begin, however such entitlement does not permit the vessel owner to turn over defective gear and equipment with immunity for injuries suffered by longshoremen as a result of the defective gear and equipment that was turned over to the longshoremen prior to commencement if there existed defects that reasonable inspection would have discovered.

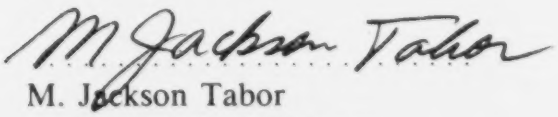
Such line of reasoning is wholly inconsistent with the *Scindia, Lemon, Pluyer, Harris, Napoli,* and *Stass* series of cases.

Negligence of the stevedore for failing to *catch* the negligence of the vessel owner for conditions such as defective equipment and gear that existed at the time of delivering the ship over to the stevedore, is not an issue in this case. The notion that a stevedore's negligence somehow relieves a shipowner of liability to an injured longshoreman are squarely rejected in *Edmunds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1959) and *Hartford Accident & Indemnity* v. *Ocean Carrier Shipholding of Belgium N.V.*, 799 F.2d. 1093 (5th Cir. 1986).

CONCLUSION

The Petition for a Writ of Certiorari should be Granted.

Respectfully submitted,



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March 4, 1988

Robert C. MORRIS, Plaintiff-Appellee,

Cooper Stevedoring Co., Inc., and Insurance Company of North America, Intervenors-Appellees,

v.

COMPAGNIE MARITIME DES CHARGEURS REUNIS, S.A., Defendant-Appellant.

No. 86-2776.

United States Court of Appeals,
Fifth Circuit.

Nov. 16, 1987.

Longshoreman brought action against shipowner to recover damages for injuries he sustained while loading cargo. The United States District Court for the Southern District of Texas, Gabrielle K. McDonald, J., held for longshoreman, and shipowner appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) if defect in ladder was hidden, shipowner was not negligent absent evidence that due care would have led it to discover defect, and (2) if defect was obvious, longshoreman should have noticed and avoided it.

Reversed.

1. Shipping Key 84(3½)

Shipowner was not negligent in failing to discover hidden defect in ladder used by longshoreman absent evidence establishing what practices constituted ordinary care among shipowners.

2. Shipping Key 84(3½)

Even if absence of rubber feet on ladder was obvious defect, shipowner was not negligent, and thus not liable to injured longshoreman, where defect was equally apparent to longshoreman, who could have avoided danger with almost no interruption of his work by using any of the other ladders "all around the ship" or by using one of his employer's own ladders locked away on deck.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, GEE, RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Invoking § 905(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA),[1] longshoreman Robert Morris sued to recover damages for injuries he sustained while loading cargo on a ship owned by Compagnie Maritime des Chargeurs Reunis. Morris's employer, Cooper Stevedoring Company, and its insurer intervened to recover compensation and medical benefits already paid to Morris. Finding the shipowner negligent for turning over to the stevedore equipment unsafe for its reasonably careful and foreseeable use, the district court held for Morris. We reverse because we find in the record no evidence that due care should have led the shipowner to discover a hidden defect and because, if the defect was obvious, the stevedore should have noticed and avoided it.

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[1] 33 U.S.C. § 905(b) (1982).

APPENDIX A-3

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I.

In the summer of 1980, Morris was working as a plugman for Cooper Stevedoring aboard the Ticonderoga. A plugman sets the plugs that lock together each layer of containers preventing the cargo from shifting while a ship is at sea. On the day of the accident, the stevedore was stacking cargo containers on the deck of the ship. After loading the first layer of containers and using a crane to lift a container to begin loading the second layer, the longshoremen noticed that the plugs were missing from one container on the first level. The stevedore's foreman instructed Morris and his co-worker Davis to set the plugs. Because the crane properly fitted for riding workers to the top of a container was already in use, Morris obtained a straight aluminum ladder belonging to the ship, leaned it against the side of the container, and climbed atop the container to set the plugs. This task completed, he began to descend the ladder, but, unsecured, it slipped on the metal deck. No one held the ladder for either his ascent or descent. Morris fell entangled with the ladder and nearly amputated his foot at the ankle. As a result of this injury, he walks with difficulty and pain, his permanent disability making it impossible for him to continue to work as a longshoreman.

The district court found that how Morris obtained the ladder was "unclear." Morris testified that the stevedore's walking foreman handed it to him and ordered him to use it, but the shipowner offered testimony suggesting that Morris went and found it himself. The parties also dispute whether the ladder was in good condition. The district court found that it was not bent or missing rungs but that it "either had not rubber feet or the rubber feet were worn slick on the bottom." The court also found that "nothing in the record suggests that either the shipowner or ship's crew had any

knowledge of the ladder's condition or the fact that Plaintiff and Davis were using the ladder."

Although by federal regulation[2] and contract, the stevedore must supply safe ladders for its employees, the district court found that in the port of Houston the custom is for stevedores to rely on the ships they are serving to provide ladders. Therefore, the district court reasoned, the shipowner should have anticipated that the stevedore would use the ladder. Finding that the shipowner had made available to the stevedore a ladder unfit for its reasonably foreseeable and careful use, the district court held the shipowner liable under *Scindia Steam Navigation Co.* v. *De Los Santos.*[3]

II.

In *Scindia*, the Supreme Court interpreted § 905(b), enacted as part of the 1972 amendments to the LHWCA, which abolished the longshoreman's right to recover against the shipowner for unseaworthiness but preserved the longshoreman's right to recover from the shipowner for negligence.[4] Determining that Congress intended the statute to

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[2] Occupational Safety and Health Admin., Labor, 29 C.F.R. § 1918.25 (1987).

[3] 451 U.S. 156,101 S.Ct. 1614, 68 L.Ed.2d 1 (1981).

[4] § 905(b) provides in relevant part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel . . . . The liability of the vessel under this subsection shall not be based upon the warranty of

relieve the shipowner of "automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore,"[5] the Court outlined the following standard for determining whether the shipowner was negligent in how it maintained the vessel before turning it over to the stevedore:

> Th[e shipowner's] duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.[6]

Relying on the first of these duties, Morris contends that the shipowner is liable for his injuries because it failed to exercise ordinary care to maintain the ladder in a condition reasonably safe for the experienced stevedore's reasonably careful use. Morris contends alternatively that the shipowner is liable because it knew or by the exercise of ordinary care should have known of the defect in the ladder, this defect was hidden, and the shipowner neglected to warn the stevedore.

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seaworthiness or a breach thereof at the time the injury occurred.

[5] *Scindia*, 451 U.S. at 168, 101 S.Ct. at 1622-23.

[6] *Id.* at 167-68, 101 S.Ct. at 1622.

[1] We analyze the claims against the shipowner based on each of the alternative facts found by the district court, even though they are clearly contradictory. The district court found first that the ladder had rubber feet, but they were worn slick on the bottom, a defect discoverable only by "turn[ing] the ladder over and inspect[ing] the bottoms of the rubber feet." If this was the defect, the issue is whether the shipowner knew or in the exercise of ordinary care should have known of it. The district court found that neither the shipowner nor the crew knew of the ladder's condition. Morris failed to establish that ordinary care would have led the shipowner to discover the defect. Indeed, the record contains no evidence establishing what practices constitute ordinary care among shipowners. Neither testimony nor documentary evidence showed that shipowners regularly inspect the ladders on their vessels or engage in maintenance programs. Shipowners may well do both in the exercise of ordinary care, but this court is not qualified to make that assumption. The district court therefore erred in finding Compagnie Maritime negligent for failing to discover a hidden defect in the absence of any evidence as to whether due care required inspections and, if so, of what kind.

[2] The district court found in the alternative that "[t]he danger posed by the ladder might have been open and obvious if the ladder simply had no rubber feet." We read this statement, although framed in terms of possibility, as a finding that the absence of rubber feet was in fact an obvious defect. If obvious, it should have been as apparent to the stevedore as to the shipowner. It is contradictory to suggest that a careful shipowner should discover an apparent defect but that a careful stevedore may miss it with impunity.

Recognizing that the stevedore should have noticed an obvious defect, the district court found that the exigent

circumstances under which Morris worked required use of the ladder, defective or not. This circuit has long held that a stevedore's actual or constructive knowledge of a danger created by a shipowner will not bar the longshoreman's recovery if, when faced with the danger, the longshoreman's " 'only alternatives would be to leave his job or face trouble for delaying work.' "[7] The record in this case supports the district court's finding that Morris and Davis were pressed to set the plugs so that the loading process could proceed. The finding of exigent circumstances, however, conflicts with another of the district court's findings: that "ladders were 'all around the ship' the day of the accident (McCall, Tr[ial Transcript] 7), and the stevedore's ladders were locked away on deck." With other ladders readily accessible, the pressure to use a clearly defective one cannot have been great. Nor would the momentary delay caused by seeking a safer ladder have significantly impaired the loading process. The finding that exigent circumstances required use of an obviously defective ladder lacking safety feet was, therefore, error.

Morris relies on *Pluyer* v. *Mitsui O.S.K. Lines*[8] as authority for holding the shipowner liable in this case. In *Pluyer*, this court affirmed a decision making a shipowner liable to a longshoreman injured while descending a ladder furnished by a member of the vessel's crew. This court accepted the trial court's findings that the ladder was missing rubber feet and that this defect was so obvious that the shipowner and the stevedore should have noticed it in the exercise of due care. In *Pluyer*, however, use of the defective ladder was

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[7] *Harris* v. *Flota Mercante Grancolombiana, S.A.* 730 F.2d 296, 299 (5th Cir.1984) (quoting *Stass* v. *American Commercial Lines*, 720 F.2d 879, 882 (5th Cir.1983)) (quoting *Napoli* v. *Hellenic Lines, Ltd.*, 536 F.2d 505, 509 (2d Cir.1976)).

[8] 664 F. 2d 1243 (5th Cir.1982).

unavoidable.[9] The court noted that "the unsafe ladder was the only one furnished" and that lashing the ladder or asking another longshoreman to hold it would have been impractical under the circumstances.[10] In this case, on the contrary, the trial court's finding that ladders were available all over the ship requires us to reject the inference that Morris had to use an unsafe one.

Morris also cites *Lemon* v. *Bank Lines Ltd.*,[11] and *Theriot* v. *Bay Drilling Corporation*,[12] cases suggesting that a shipowner is liable for injuries caused by an obviously dangerous condition existing on the ship before the stevedore assumed control even without a showing of circumstances requiring the longshoreman to encounter the danger. In *Lemon*, a longshoreman was unloading a ship's hold when he noticed that the cargo seemed unstable. In an attempt to secure the stowage, he fell, some of the cargo toppled with him, and he was injured. This court overturned a judgment n.o.v. for the shipowner, finding sufficient evidence on which a reasonable jury could have concluded that the ship's crew had actual knowledge of the improper loading technique and failed to correct the stowage or to warn the stevedore. In reaching this decision, the court read *Scindia* as follows:

> The Supreme Court has clearly established that the ability of a longshoreman to recover cannot turn on who was in the best position to recognize and remedy a dangerous condition when the condition was created by a vessel owner who knew or should have known of its existence prior to the stevedore's operations.[13]

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[9] *Id.* at 1248.

[10] *Id.* at 1247.

[11] 656 F.2d 110 (5th Cir. 1981).

[12] 783 F.2d 527 (5th Cir.1986).

[13] *Lemon*, 656 F.2d at 116.

The *Theriot* court employed similar reasoning. Theriot, a torque-wrench operator on a drilling barge, was called upon to assemble certain well head equipment. As he approached the deck where the equipment was located, he encountered a large area visibly covered with drilling mud. Crossing the deck, he fell in the mud and injured his knee. This court affirmed the district court's holding that the shipowner was liable, not only because if failed to clean the deck before Theriot began his work, but also because it continued to control the work area in which the accident occurred.[14] The court apparently rejected the shipowner's argument that to establish its liability, Theriot had to show the necessity of facing the obvious danger, and yet in rejecting this argument the court quoted the familiar rule that "when faced with an openly dangerous shipboard condition, the longshoreman's 'only alternatives would be to leave his job or face trouble for delaying the work.' "[15]

We do not understand *Lemon* and *Theriot* to overrule the cases predicating the shipowner's liability on a showing of circumstances pressing the longshoreman to risk a danger notwithstanding the stevedore's knowledge of that danger.[16] As *Pluyer* demonstrates, the longshoreman need not show that he had no possible alternative but to use defective equipment or to work in a dangerous area. The burden is not so heavy. He need show only that the circumstances made safer alternatives unduly impractical or time-consuming. In both *Lemon* and *Theriot*, the longshoreman had no alternatives but to stop or delay their work. To continue unloading the cargo, Lemon had to work in a hold improperly stowed.

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[14] *Theriot*, 783 F.2d at 535.

[15] *Id.* at 536, (quoting *Stass*, 720 F.2d at 882) (quoting *Napoli*, 536 F.2d at 509).

[16] *See, e.g., Harris*, 730 F.2d at 299; *Pluyer*, 664 F.2d at 1247-48.

To reach the equipment he was to assemble, Theriot had to cross a deck slippery with mud, find a safer way around the ship, or wait for the mud to be cleaned up. In this case, on the contrary, Morris and the stevedore could have avoided the danger with almost no interruption of their work by using any of the safe ladders "all around the ship" or by using one of the stevedore's own ladders locked away on deck.

We emphasize that we do not here resurrect the defenses of contributory negligence or assumption of risk laid to rest by *Scindia*[17] and by subsequent decisions of this court.[18] If Morris were negligent and the shipowner were also negligent, Morris could recover damages from the shipowner reduced only by his proportionate fault.[19] In this case, however, the shipowner was not negligent. *Scindia* entitles the shipowner to rely on an "expert and experienced stevedore" acting with "reasonable care."[20] Cooper stevedoring fell well below this standard in failing to notice and to take the easy steps that would have avoided the obvious danger presented by the defective ladder. Because the shipowner has no duty to anticipate the actions or inaction of a careless stevedore, Morris must look only to his employer for compensation for his injuries.

For these reasons, we REVERSE the district court's holding.

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[17] 451 U.S. at 176 n. 22, 101 S.Ct. at 1626 n. 22.

[18] *Theriot*, 783 F.2d at 536; *Stass*, 720 F.2d at 882; *Lemon*, 656 F.2d at 116.

[19] *See Theriot*, 783 F.2d at 536.

[20] *Scindia*, 451 U.S. at 168, 101 S.Ct. at 1622.

APPENDIX B-1

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 86-2776

D.C. Docket No. CA-H-80-2856

ROBERT C. MORRIS,
Plaintiff-Appellee,

COOPER STEVEDORING CO., INC. and
INSURANCE COMPANY OF NORTH AMERICA,
Intervenors-Appellees,

VERSUS

COMPAGNIE MARITIME DES CHARGEURS REUNIS, S.A.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Before CLARK, Chief Judge, GEE, and RUBIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellee and intervenors-appellees pay to defendant-appellant the costs on appeal, to be taxed by the Clerk of this Court.

November 16, 1987

ISSUED AS MANDATE:

APPENDIX B-2

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 86-2776

ROBERT C. MORRIS,
Plaintiff-Appellee,
COOPER STEVEDORING CO., INC. and
INSURANCE COMPANY OF NORTH AMERICA,
Intervenors-Appellees,
VERSUS
COMPAGNIE MARITIME DES CHARGEURS REUNIS, S.A.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

ON PETITIONS FOR REHEARING
(December 8, 1987)

Before CLARK, Chief Judge, GEE and RUBIN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied. The court has corrected the erroneous reference to "deck," which stemmed from the reference in the district court opinion.

ENTERED FOR THE COURT:

. . . . . .
United States Circuit Judge

APPENDIX C-1

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. No. H-80-2856

ROBERT C. MORRIS,

Plaintiff,

VERSUS

COMPAGNE MARITIME DES CHARGUERS REUNIS, S.A., and S/S SEATRAIN TICONDEROGA,

Defendants.

FINDINGS OF FACT

The Plaintiff

1. Plaintiff is Robert C. Morris, a 43 year-old longshoreman.

2. At all times relevant to the lawsuit at bar, Plaintiff was a member of the International Longshoreman's Union Local 872. Plaintiff has twenty-three years' seniority as a longshoreman.

3. Between 1971 and 1980, Plaintiff had worked only intermittently as a longshoreman. Both paranoid schizophrenia and various physical injuries caused Plaintiff's periodic inability to work. However, for the thirteen weeks prior to the accident giving rise to the case at bar, Plaintiff had worked steadily as a longshoreman. No evidence in the record suggests that, barring further bodily injury, Plaintiff would not have been able to work as a longshoreman. Moreover, testimony adduced at trial indicated that Plaintiff at the time of the accident was working proficiently (McCall, Tr. 4).

4. Plaintiff was injured on June 24, 1980, while working as a longshoreman. He subsequently sued over that injury, bringing the instant case under § 905(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 950(b) ("LHWCA"). Plaintiff sued the vessel and Defendant Compagne Maritime des Charguers Reunis, S.A., the vessel's owner.

The Loading Process

5. On the day of the accident, the vessel on which the accident occurred, the S. S. Seatrain *Ticonderoga*, was loading at Barbour's Cut near Houston, Texas.

6. The stevedore loading the *Ticonderoga* was Cooper Stevedoring Co., Inc.

7. The stevedores were, on June 24, 1980, loading cargo containers onto the *Ticonderoga*. The cargo containers were to be stacked on the ship in layers.

8. The cargo containers were lifted by a crane from trucks on the dock and placed on the ship. This crane was equipped with a spreader bar, which has a personnel basket.

9. Stevedores must go up onto the top of the cargo containers in order to set plugs. These plugs are metal devices that help lock together containers stacked atop another, thereby preventing the containers from shifting while the ship is at sea.

10. In order to reach the top of the first layer of containers, stevedores commonly use ladders (Keal, Tr. 24; McCall, Tr. 42). When ascending above one-high, stevedores generally use spreader bars.

11. By regulation and contract, stevedores who furnish ladders must provide safe, strong ladders for their employees. *See* 29 C.F.R. 19.18.2(a) (1979) ("there shall be at least one safe and accessible ladder for each gang working

in a hatch"). However, the practice in the stevedoring industry is not to rely upon the stevedore to furnish the ladder. Instead, stevedores commonly use ship's ladders to go one-high (Aleccia, Tr. 25; Keal Cross-Examination, Tr. 16, 19).

12. Generally, stevedores who use straight ladders to go one-high either brace the ladder against something or ask someone to hold the ladder while they are on it (Aleccia, Tr. 19-20). However, at times nothing on which to brace or someone to hold the ladder is available. (Keal, Tr. 40; McCall, Tr. 13-14).

The Accident

13. On the day of the accident, Plaintiff was working as a plugman for Cooper Stevedoring on the *Ticonderoga.*

14. Plaintiff started working at approximately 1 p.m.

15. About 3 o'clock, the first layer of cargo containers had been placed on deck. Plugs were missing from one container, and the crane with the spreader bar was already loaded with another container and waiting for the last plugs to be set so that the container on the crane could be loaded.

16. Testimony suggests that the walking foreman on the job, Wilfred Keal, Jr., instructed his men not to use ladders at all, but rather to ride the spreader bar whenever going to the top of a container (Keal, Tr. 7). However, Plaintiff and Davis went up a ladder belonging to the ship to the top of the container. The metal ladder either had no rubber feet or the rubber feet were worn slick on the bottom (McCall, Tr. 9-11). However, the ladder was not bent or missing rings. In order to discover that the pads were worn slick, the stevedores would have had to turn the ladder over and inspect the bottoms of the rubber feet. Plaintiff and Davis used the ladder because of the exigencies of their circumstances; the plugmen had to set the plugs in the last one-high

container before loading operations could proceed (Keal, 37-39).

17. Once Plaintiff completed his task, he began to climb down the ladder to the deck. Davis was still atop the container as Plaintiff began to descend, and no one held the ladder for Plaintiff.

18. As Plaintiff was climbing down the ladder, the ladder slipped and fell to the deck. Plaintiff fell with the ladder, severly injuring his ankle. The ankle was nearly amputated. Plaintiff was taken to a hospital for treatment.

19. Ladders were "all around on the ship" the day of the accident (McCall, Tr. 7), and the stevedores's ladders were locked away on deck (Keal Cross-Examination, Tr. 36-34). Where the ladder was before Plaintiff used it and precisely how it came in Plaintiff's hands is unclear, but that the ship owned the ladder is undisputed.

Plaintiff's Post-Accident Condition

20. As a result of the injury to his ankle, Plaintiff walks with difficulty and suffers considerable pain (Plaintiff's Exh. XXVIX, p.22). Plaintiff will continue to experience pain and suffering for the remainder of his life.

21. Plaintiff's ankle injury makes it impossible to earn a livelihood at his normal profession of longshoring (*see, e.g.*, Plaintiff's Exh. XXX, p. 34; McCall, Tr. 20). Plaintiff's physical condition will likely not improve, but will degenerate as time passes.

22. Nothing in the record suggests that either the shipowner or ship's crew had any knowledge of the ladder's condition or the fact that Plaintiff and Davis were using the ladder off which Plaintiff fell.

23. Plaintiff's life expectancy at the time of the accident was 30.2 years. Plaintiff's worklife expectancy was that he would work until age 62 (Plaintiff's Exh. XXIV).

24. Plaintiff's average weekly wage for the time he was employed prior to June 24, 1980 was $707.90 per week (Plaintiff's Exh. XIII).

25. Plaintiff's lost earnings to date total $144,411.00; his lost earnings for the remainder of his worklife expectancy are $672,500.00.

26. Plaintiff's reasonable medical expenses to date total $9,691.00 (Plaintiff's Exh. XXX, pp. 39-46; Plaintiff's Exh. XXVIX, pp. 26-29). Plaintiff's future medical costs include an average of four doctors visits a year, costing $150.00 per visit, and a $4,000.00 arthordesis (Plaintiff's Exh. XXX, pp. 36-38).

27. All findings of fact that are conclusions of law are hereby adopted as such.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the instant case, as it is brought under the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*

2. Venue is properly laid in Houston.

3. The Supreme Court outlined the duties that a shipowner owes a stevedore's employees in *Scindia Steam Nav. Co.* v. *De Los Santos,* 451 U.S. 156 (1981). The *Scindia* Court delineated three distinct duties owed longshoremen:

> (i) Before the loading or unloading begins, the shipowner must at least exercise "ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety." The shipowner may rely on the stevedore to perform its

work with reasonable care, but must warn the stevedore of "any hazards on the ship or with respect to its equipment that would likely be encountered by the stevedore in the course of his cargo operations and that are not known to the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work." 451 U.S. at 166-67; 101 S.Ct. at 1622.

(ii) Once the work starts, the shipowner has no general duty to monitor the stevedoring operation, "absent contract provision, positive law, or custom to the contrary,: and it may rely on the stevedore's judgment that equipment is reasonably safe for continued use during the work. "The shipowner, within limits, is entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations." *Id.* at 172, 101 S.Ct. at 1624 (original emphasis).

(iii) However, the shipowner is entitled to rely on the stevedore's judgment only until the shipowner becomes aware of a hazard on the ship and that the stevedore is unreasonably failing to protect the longshoremen against the hazard, at which time it has a "duty to intervene" and remedy the hazard. Although the shipowner is deemed to know about hazards existing before the work begins, it must have actual knowledge of hazards which develop during the operations.

Id. at 175-76.

4. The first of the three duties applies in the case at bar. Given that the custom in the local industry was for stevedores to use ships' ladders on one-high containers, the vessel owner should have known that the stevedore might well use the ladder involved in the accident in stevedoring operations. The shipowner in the exercise of reasonable care should have had the ladder in such a condition that the stevedore could have used it "by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property . . . ." *Scindia*, 451 U.S. at 167.

5. Defendant argues that the case at bar is controlled by *Wild* v. *Lykes Bros. Steamship Corp.*, 734 F.2d 1124 (5th Cir. 1984). In *Wild*, the Fifth Circuit affirmed a district court's ruling that a plaintiff stevedore had failed to establish liability on the part of the shipowner. Plaintiff's foreman in *Wild* unbolted a ship's guardrail which served a secondary function as a ladder, and gave the guardrail — turned — ladder to Plaintiff. Plaintiff was injured when he slipped from the ladder. *Id.* at 1125. The district court found that the device was defective and unreasonably dangerous when used as a ladder, but held that the third duty, not the first, applied, and absolved Lykes of liability. The Fifth Circuit agreed, holding that the shipowner's duty was the third one outlined above and that Plaintiff had failed to demonstrate that Defendant had actual knowledge of the stevedore's using the device as a ladder.

6. Although superficially similar to *Wild*, the case at bar is distinguishable in two respects. First, and most important, the *Wild* Court applied the third duty and not one first because to do otherwise would be to impose a duty of ongoing inspection on the shipowner, a duty the 1972 amendments to the LHWCA sought to prevent imposing. *See Scindia*, 451 U.S. at 164-66; *Lemon* v. *Bank Lines, Ltd.*, 656 F.2d 110, 115 (5th Cir. 1981). In *Wild*, no evidence suggested that the ship had intended or reasonably known that the guardrail would be used as a ladder. In fact, the device was bolted in place as a guardrail; the stevedore had to undo the device and turn it into a ladder. Moreover, the shipowner had little reason in *Wild* to anticipate that the guardrail would be used as a ladder, because the stevedores "had used gangways [a safe alternative to the guardrail/ladder] before in similar situations. . . ." *Wild*, 734 F.2d at 1127. The critical difference between *Wild* and the instant case is that in *Wild*, if the guardrail were "gear" that the ship

had to turn over in safe condition, *i.e.*, as a guardrail and not a ladder, the shipowner would have to keep constant watch over the guardrail during the stevedoring operations to ensure that no one rendered the gear unsafe by using it as a ladder. In contrast, in the case at bar, the ship would only have an initial task to ensure that its gear was safe, with no necessity for ongoing inspection. Thus, unlike as in *Wild*, " 'The policy considerations which militate against imposing a duty on the shipowner to constantly monitor the stevedore's work are . . . not applicable.' " *Id., citing Pluyer* v. *Mitsvi O.S.K. Lines, Ltd.*, 664 F.2d 1243, 1246 (5th Cir. 1982) (footnote omitted).

The second distinction between the case at bar and *Wild* is that the gear in *Wild* did not fit the requirements of the first *Scindia* duty in two ways. Initially, the guardrail *qua* guardrail was not unsafe; only as a ladder was the device unreasonably dangerous. The guardrail was in the guardrail position when turned over to the stevedore; consequently, no unsafe gear existed before cargo loading operations began. In addition, as noted above, the ship in *Wild* could not reasonably anticipate that the guardrail would be used as a ladder; the gangway, a safe alternative means of access, had been used prior to the accident. In the case at bar, in contrast, the common practice in the industry was to use ships' ladders. Thus, the *Ticonderoga* should have foreseen that its ladders would be employed by stevedores.

7. *Pluyer, supra*, governs the case at bar. In *Pluyer*, Plaintiff fell from an unsafe ladder supplied to him by a crewmember. The district court found the ship liable for a breach of the first *Scindia* duty, and the Court of Appeals affirmed. The mere fact that in *Pluyer* an identifiable crewmember gave the stevedores a ladder, whereas here Plaintiff either found a ladder or was given it, is a distinction without a difference. The *Pluyer* court did emphasize that

furnishing the ladder was "active negligence" that caused liability. However, leaving a thing out in the open when one can reasonably anticipate will be used is tantamount to supplying that thing. Moreover, the *Pluyer* court's focus on "active negligence" once again reflects concern that ships not be held to ongoing duties of inspection of their gear. In order to prevent the *Pluyer* plaintiff from getting a defective ship's ladder, the ship need only control its unsafe gear, *e.g.*, lock it up, and then instruct its crew not to give the unsafe gear to the stevedores. *Compare Wild, supra,* where in order to ensure that the ship's gear was safe, the ship would have to keep an ongoing watch over the guardrail.

Wild, supra, where in order to ensure that the ship's gear was safe, the ship would have to keep an ongoing watch over the guardrail.

8. The danger posed by the ladder might have been open and obvious if the ladder simply had no rubber feet. However, the obviousness of the ladder's defect does not bar Plaintiff's recovery. The crane operator could not load the second tier of containers until Plaintiff and Mr. Davis set the plugs on the container off which Plaintiff fell. Plaintiff had no choice but to use the ladder to climb onto and down from the container, given the need to proceed quickly and that the crane to which the spreader bar was attached was loaded with a container. "[T]hat the danger was 'obvious' is not necessarily a complete defense to a longshoreman's suit," if when faced with an openly dangerous shipboard condition, the longshoreman's " 'only alternatives would be to leave his job or face trouble for delaying the work.' " *Harris* v. *Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296, 299 (5th Cir. 1984), *quoting Stass* v. *American Commercial Lines, Inc.*, 720 F.2d 879, 882 (5th Cir. 1983), *quoting Napoli* v. *Helenic Lines Ltd.*, 536 F.2d 505, 509 (2d Cir. 1976). *See also Hill* v. *Texaco Inc.*, 679 F.2d 447, 457 n.5 (5th Cir. 1982).

9. The OSHA regulations and Local Rules regarding ladders do not affect the outcome of the case at bar. The regulations do not impose an exclusive duty to furnish ladders on the stevedore; in addition, the industry's custom was to use ship's ladders in stevedoring operations. Thus, the ship should have anticipated that its ladders would be used as gear in the loading of cargo onto the *Ticonderoga.*

10. Plaintiff's damages are $144,411.00 in lost earnings to date; $672,000.00 in future lost earnings; $9,691.00 in reasonable medical expenses; and $30,740.00 in future medical expenses.

11. Plaintiff's damages for pain and suffering incurred in the past and to be suffered in the future as a result of the accident described above are $100,000.00.

12. An award of punitive damages would be inappropriate in the case at bar. Punitive damages are available only for "intentional, aggravated and outrageous misconduct and to deter the defendant and others from engaging in the same or similar acts. *Houston* v. *Bechtel Associates Professional Corp., D.C.,* 522 F.Supp. 1094, 1097 (D.D.C. 1981) (citations omitted). No such circumstances exist in the instant case.

13. All conclusions of law that are actually findings of fact are hereby adopted as such.

The Clerk shall file this Order and provide a true copy to counsel for all parties.

DONE at Houston, Texas, this 16th day of August, 1985.

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GABRIELLE K. McDONALD
UNITED STATES DISTRICT
JUDGE

KTl/av

APPENDIX D-1

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. No. 80-2856

ROBERT C. MORRIS,
Plaintiff,

COOPER STEVEDORING CO., INC.,
INSURANCE CO. OF NORTH AMERICA,
Intervenors,

VERSUS

COMPAGNIE MARITIME DES CHARGEURS REUNIS, S.A.,
Defendant.

FINAL JUDGMENT

For all of the reasons stated in the Court's Findings of Fact and Conclusions of Law of August 16, 1985, amended by subsequent Orders to date, and rulings at the Motion hearing of March 10, 1986, it is adjudged that judgment is awarded to Plaintiff Robert C. Morris against Defendant Compagnie Maritime des Chargeurs Reunis, S.A. It is accordingly,

ORDERED, ADJUDGED and DECREED that Plaintiff is entitled to the following in damages: $144,411.00 in lost earnings to date; $440,622.00 in future lost earnings; $9,691.00 in reasonable medical expenses; $21,112.00 in future medical expenses; and $100,000.00 for pain and suffering.

Intervenor Insurance Company of North America is entitled to recover $128,122.56 from the total of Plaintiff's recovery in return for compensation benefits paid to Plaintiff on behalf of Cooper Stevedoring Company, Inc., and to

$18,936.57 from the total of Plaintiff's recovery in return for medical benefits paid for Plaintiff.

Further, Plaintiff shall be entitled to recover pre-judgment interest upon the $144,411.00 in past damages incurred by reason of lost earnings, to the date of Judgment, at the rate of ten percent (10%) per annum compounded; and it is further Ordered that Intervenor is entitled to receive from said sum their pro rata share of said interest. In is further Ordered that Intervenor shall receive the sum of $6,696.86 as interest on the past medical expenses paid by them.

Finally, Plaintiff is entitled to receive interest at the rate of ten percent (10%) per annum compounded monthly upon the full amount of said judgment plus the accrued interest earned up until the date judgment is paid. Intervenor is to receive its pro rata share of said interest, if any.

The Clerk shall file this Order and provide a true copy to counsel for all parties.

DONE at Houston, Texas, this 11th day of September, 1986.

GABRIELLE K. MCDONALD
GABRIELLE K. McDONALD
UNITED STATES DISTRICT
JUDGE